IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

EDWARD EUGENE QUALIN,
Appellant,

vs.

UNITED STATES OF AMERICA
Appellee.

No. 22765 22772

APPELLEE'S BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

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APPELLEE'S BRIEF

I

JURISDICTIONAL STATEMENT

This is an appeal from the judgment of the United States District Court for the Southern District of California, adjudging appellant, Edward Eugene Qualin to be guilty of both counts of a two-count indictment, following a non-jury trial. [C. T. 15][1].

The offenses occurred in the Southern District of California. The District court had jurisdiction by virtue of Title 21, United States Code, Section 3231 and Title 21, United States Code, Section 176 (a). Jurisdiction of this court rests pursuant to Title 28, United States Code, Sections 1291 and 1294.

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[1] "C. T." refers to Clerk's Transcript.

STATEMENT OF THE CASE

Appellant was charged in both counts of a two-count indictment returned by the Federal Grand Jury for the Southern District of California at San Diego, California on September 13, 1967. [C. T. 2-3] .

The first count alleged that appellant, with intent to defraud the United States, knowingly imported eighty pounds of marihuana into the United States from Mexico, contrary to law. [C. T. 2] .

The second count alleged that appellant, with intent to defraud the United States, knowingly concealed and facilitated the transportation and concealment of eighty pounds of marihuana which, as the defendant then and there well knew, had been imported and brought into the United States contrary to law. [C. T. 3] .

Non-jury trial of appellant commenced on October 26, 1967 and on that same day appellant was found guilty before then United States District Judge James M. Carter. [C. T. 14, 15] .

On the same date, October 26, 1967, appellant was committed to the custody of the Attorney General for a sixty day study under Title 18, United States Code, Section 5010 (e). [C. T. 17] .

On January 15, 1968, Judge Carter committed appellant to the custody of the Attorney General for treatment and supervision pursuant to Title 18, United States Code, Section 5010 (b) (Federal Youth Corrections Act) until discharged by the board of parole as provided in Title 18, United States Code, Section 5017(c) on counts one and two to run concurrent. [C. T. 19] .

[2] "R. T. " refers to the Reporter's Transcript on Appeal.

Subsequently, on January 22, 1968, appellant filed a notice of appeal. [C. T. 20].

III.

ERROR SPECIFIED

1. The court erred in finding the appellant guilty of both counts because there was insufficient evidence to show appellant had knowledge of the contents of the automobile.
2. There was entrapment as a matter of fact.

IV.

STATEMENT OF THE FACTS

On August 9, 1967, at 7:00 a. m., appellant entered the United States from Tijuana, Mexico as the driver of an El Camino Chevrolet pickup truck. [R. T. 23-24] [2].

Appellant appeared to Customs Inspector Cruickshank to have been "dopey or drinking or something." Appellant stated he had not been drinking. [R. T. 23].

Inspector Cruickshank found 38 bricks of marihuana in the bottom and side panels of the truck bed. [R. T. 24-25]. The truck was registered to Donald P. Harris. [R. T. 26]. Appellant told the officer it was Harris's car before the marihuana was found [R. T. 28]. Cruickshank smelled no alcohol. Appellants eyes were half shut. [R. T. 28].

The vehicle was on the "lookout" list and had been for one or two days. [R. T. 34].

Appellant declared he was bringing nothing from Mexico. [R. T. 43].

Jackie Ray Bailes testified he provided information to Customs Agent Spohr concerning the truck. He knew appellant and Don Harris, the owner of the truck. [R. T. 49].

After the information was provided to Spohr and before appellant's arrest, Bailes had a conversation with Harris and pointed out appellant. [R. T. 53-54].

Bailes and appellant had a conversation in the jail in August or September. Appellant said that he had changed his mind, then he figured he had better go ahead and do it. [R. T. 55].

Appellant's counsel agreed with the court there was no issue of entrapment. [R. T. 58].

Appellant told Agent Spohr after being advised of his rights, that he had known Don only two days, that Don had loaned him some money for a motel for him and his girl friend, and that upon deciding to go to San Diego he asked to borrow Don's car. Don told him the car was parked across from the Chicago Club in Tijuana. A Mexican man with a moustache gave him the keys to Don's truck. He was to leave the truck at Fifth and "G" in San Diego. He left the girl friend situated in the motel, but wasn't certain of her name and address, but thought she lived in Pacific Beach. [R. T. 61-62].

Trial counsel for appellee stated to the court the government would rely principally on possession. [R. T. 65].

V.

ARGUMENT

A. SUFFICIENCY OF THE EVIDENCE.

It is well settled that on appeal the facts are to be interpreted most favorable to the government.

Glasser V. United States, 315 U. S. 60 (1942).

It is clear that appellant, as the sole occupant, drove the truck into the United States from Tijuana containing 38 bricks of marihuana.

The only question is knowledge. Did he know the marihuana was in the truck when it entered the United States?

Appellant would expect the court to believe he was to drive the truck from Tijuana to San Diego for one hundred dollars without knowing what the truck contained. The owner, Harris, had only been known to appellant two days. From the record, it appeared he borrowed the truck from Harris on the "spur of the moment." Harris surely doesn't keep his truck sitting on the streets of Tijuana loaded with marihuana waiting for someone to ask to borrow his truck.

The court was advised by appellee's trial counsel for appellee, the government would rely on possession. [R. T. 65].

The statutory presumption reads as follows:

"Whenever on trial for a violation of this subsection, the defendant is

shown to have or to have had the marihuana in his possession, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains his possession to the satisfaction of the jury."

Title 21, United States Code, Section 176(a), (second paragraph).

In this case, there is no question as to possession. Was it a knowing possession? Since jury was waived, Judge Carter became the finder of fact. In finding appellant guilty, he surely found knowledge.

Actual possession is a potent circumstance from which to infer knowledge.

Evans v. United States, 257 F. 2d 121 (9th Cir 1958), (Cert. Den. 358 U. S. 866).

This is particularly true, where there is such a large quantity of marihuana.

B. THERE IS NO ISSUE OF ENTRAPMENT

Appellant did not preserve the issue of entrapment on appeal. In fact, appellant conceded there was no issue of entrapment.

The following took place during the trial upon direct examination of Jackie Bailes, the informant. [R. T. 58]

Q. (by Mr. Gott) And what information did you receive?

A. (by Mr. Bailes) At that time. . .

Mr. Harr: I will object to that, your Honor, as hearsay.

The Court: It can only be admissible on the issue of probable cause. The car was stopped at the border.

Mr. Gott: I agree that border cases don't require probable cause, but I

m under the impression that based upon questions the Court and counsel sked, there may be an issue of entrapment here, and I do feel that---

The Court: There's no issue of entrapment.

Mr. Horn: No.

The Court: All right.

The defense of entrapment may not be raised for the first time on appeal.

Ramirez v. United States, 294 F. 2d 277 (9th Cir. 1960).

Grant v. United States, 291 F. 2d 746 (9th Cir. 1961).

Cert. den. 368 U. S. 999, 1962.)

In Cellino v. United States, 276 F. 2d 941 (9th Cir. 1960), where the appellant and his attorney were told that the judge knew they did not want an instruction on entrapment and no exception was taken, the issue would not e decided on appeal.

Assuming the points were preserved, there is no entrapment. Willingess to commit the acts, as evidenced by ready complaisance negates a claim f entrapment.

United States v. Becker, 62 F. 2d 1007, 1008 (2nd Cir. 1933). Assuming nowledge, as found by the court, appellant stood ready to commit the acts harged.

There need not be evidence that agents have knowledge of illegal activities efore they approach a suspect.

Hadley v. United States, 18 F. 2d 507 (8th Cir. 1927). This would amount o giving the peddler "one free shot" before he could be convicted.

Young v. United States, 286 F. 2d 13, 15 (2nd Cir. 1960). Appellant's defense is apparently lack of knowledge. The defense of entrapment is generally unavailable to one who denies committing the crime.

Ortiz v. United States, 358 F. 2d 107 (9th Cir. 1956).

VI.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the Court below should be affirmed.

Respectfully submitted,

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CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

Shelby R. Gott

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